IN THE

Supreme Court of the United States

October Term, 1976.

No. 76-1581

ABRAHAM E. FREEDMAN,

Petitioner,

v.

HONORABLE A. LEON HIGGINBOTHAM, JR., Judge of the United States District Court for the Eastern District of Pennsylvania,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT.

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To the Honorable, The Chief Justice and the Associate Justices of the Supreme Court of the United States:

Petitioner, Abraham E. Freedman, Esquire, respectfully prays that a Writ of Certiorari issue to review the judgment of the United States Court of Appeals for the Third Circuit, entered herein on February 7, 1977.

OPINIONS BELOW.

The Order, Findings and Commitment of Contempt of the United States District Court for the Eastern District of Pennsylvania dated September 28, 1976 is not officially

reported and is printed as Appendix C herein. The Opinion of the United States District Court for the Eastern District of Pennsylvania denying Motion for Stay of Proceedings is not reported and is printed as Appendix D herein. The Findings and Memorandum Order of the United States District Court for the Eastern District of Pennsylvania dated November 10, 1976, is not reported and is printed as Appendix E herein. The opinion of the United States Court of Appeals for the Third Circuit is not yet officially reported and is printed as Appendix F herein The Judgment of the United States Court of Appeals for the Third Circuit is not reported and is printed as Appendix G herein. The Order of the United States Court of Appeals for the Third Circuit denying Petition for Rehearing is not reported and is printed as Appendix H herein.

JURISDICTION.

The Judgment of the United States Court of Appeals for the Third Circuit was entered on February 7, 1977 (Appendix G). The Petition for Rehearing was denied on March 14, 1977 (Appendix H). The Jurisdiction of this Court is invoked under 28 U. S. C. § 1254(1).

QUESTION PRESENTED.

May an attorney be held guilty of criminal contempt where he states his reason for an objection or makes an offer of proof, in order to preserve his client's interests on appeal, contrary to instructions from the Trial Judge?

STATUTES INVOLVED.

The statutory provisions involved are 28 U. S. C. § 401 and Federal Rules of Criminal Procedure, Rule 42(a).

STATEMENT OF THE CASE.

The within Petition arises out of two separate instances wherein petitioner, Abraham E. Freedman, an attorney, was found guilty of criminal contempt because of his efforts to make an adequate offer of proof in order to preserve objections for appeal during the course of a lengthy trial in the United States District Court for the Eastern District of Pennsylvania. The trial involved commenced on January 15, 1976 and is still in progress.

At issue in the trial is the plaintiffs' contention that the defendants, including Local 542, International Union of Operating Engineers, represented by petitioner Freedman, discriminated against the plaintiff class on the basis of race and illegally denied them employment opportunities.

The first finding of contempt arose under the following circumstances. Plaintiffs had offered as a witness one Bennett O. Stalvey, *a government official*, who had worked with counsel for plaintiffs and gave an affidavit to the complaint in the preparation of the law suit. Mr. Stalvey, in his affidavit, alleged that the federal government had withheld over $30,000,000.00 in federal funds for highway construction in the Spring of 1968 because of "questions concerning the availability of membership in and the referral practices of Local 542." In cross-examination of Mr. Stalvey, petitioner Freedman sought to introduce portions of Mr. Stalvey's pretrial deposition in which Mr. Stalvey admitted that he *could not say* whether such withholding of funds was because of any practices of Local 542, and in which Mr. Stalvey further admitted that he had had *no contact* with Local 542.

The portion of the pretrial depositions which petitioner sought to introduce ran over several pages, as Mr. Stalvey had been evasive in his answers and had to be

repeatedly pressed for specific answers to counsel's questions. During the course of introducing these pages from the pretrial deposition, counsel for plaintiffs objected to the reading of the transcript and the District Judge sustained the objection. Petitioner objected to this limitation on his right to cross-examine the witness and sought to state on the record the reason for his objection. The District Judge refused to permit petitioner to state his reason for the objection and threatened to hold him in criminal contempt if he did so. Petitioner then stated as follows:

> "MR. FREEDMAN: I deem it my responsibility under the law when I make an objection to give the reason for the objection. I have done this all of my trial life, and I consider it not only my right to do it but my duty to do it.
>
> As I said to Your Honor before, I meant no disrespect in any way, and representing my client's interests I have to do it to the best of my judgment.
>
> I don't intend to be subservient, but I don't intend to be disrespectful and I haven't been disrespectful, and I am doing what the law requires me to do to state the reasons for my objections as I state the objections. If Your Honor doesn't want to hear it, then it is for the benefit of the appellate court."

The District Court continued in its refusal to permit Mr. Freedman to state the basis for his objection and, when Mr. Freedman insisted upon doing so, held him in criminal contempt and sentenced him to thirty days imprisonment.

The second incident occurred on November 9, 1976. Plaintiffs had called as a witness one Samuel F. Long, a black man and a member of the Union. Mr. Long testified concerning his attempts to join Local 542 and concerning

efforts he had made to obtain employment at the United States Steel Plant in Morrisville, Pennsylvania. The substance of Mr. Long's testimony was that he was denied employment at Morrisville because he was black, and that jobs which should have been available to him were given to white members of the Union.

In cross-examining Mr. Long, petitioner sought to introduce his work record which demonstrated that Mr. Long had received a steady flow of and an overabundance of work through the Union and had not been the victim of any discrimination, racial or otherwise. This effort to introduce the work record was objected to as being beyond the scope of direct examination. The District Judge sustained this objection and sought to limit the cross-examination solely to matters involving Mr. Long's attempt to obtain work at Morrisville and on another job in Delaware concerning which Mr. Long had also testified. Petitioner then sought to make an offer of proof to show that the work record would demonstrate that there had been no discrimination against Mr. Long and that he had received a vast number of jobs through the Union. When the Court denied petitioner the right to develop this material, petitioner responded that he had an obligation to make an offer of proof to protect the record for appellate review. Upon petitioner insisting on making this offer of proof, the District Court again held him in criminal contempt and fined him $500.00.

Both the foregoing findings of contempt were appealed to the Third Circuit Court of Appeals which affirmed the decisions of the District Judge (Appendix F). The Court of Appeals held that *whether right or wrong*, the Order of the Trial Judge had to be obeyed *even if it meant that no reason for the objection or no offer of proof could be made*. It is from that ruling that this petition is filed.

REASONS FOR GRANTING THE WRIT.

The Decision Below Denies the Unqualified Right to Preserve an Objection on Appeal, Contrary to This Court's Decisions in Maness v. Meyers, 419 U. S. 449 and Sacher, et al. v. United States, 343 U. S. 1, Which Hold That the General Rule of Obedience to the Trial Judge's Ruling Does Not Come Into Play Until After Counsel Has Preserved His Point for Appeal.

Crucial to our adversary system of trial is the right of counsel to vigorously and effectively represent a client's position. *Offutt v. U. S.*, 348 U. S. 11, 13. In *Sacher, et al. v. United States*, 343 U. S. 1, after a trial of the Communist party leaders, their attorneys were held guilty of contempt and the sole question before this Court was whether the Trial Judge was authorized under the rules to impose punishment himself or whether the charges must be adjudged by another court. In reviewing the rights of counsel and upholding the right to present a "fearless, vigorous and effective performance", this Court first said, 343 U. S. at 13:

> "But that there may be no misunderstanding, we make clear that this Court, if its aid be needed, will unhesitatingly protect counsel in fearless, vigorous and effective performance of every duty pertaining to the office of the advocate on behalf of any person whatsoever . . ."

Further, the Court said, with respect to the point at issue here, that the duty of obedience to the court's ruling is subject to counsel's right to preserve his point on appeal. Said the Court, 343 U. S. at 9:

> "Of course, it is the right of counsel for every litigant to press his claim, even if it appears farfetched and untenable, to obtain the court's considered ruling. Full enjoyment of that right, with due allowance for the heat of controversy, will be protected by appellate courts when infringed by trial courts. But if the ruling is adverse, it is not counsel's right to resist it or to insult the judge—*his right is only respectfully to preserve his point for appeal* . . ." (Emphasis supplied)

This is precisely what petitioner was seeking to do here—respectfully preserve his point for appeal. The order of the Trial Judge denied him this most basic of rights, which counsel had the duty to assert in the protection of his client's interest notwithstanding the ruling of the Trial Judge.

To the same effect is the ruling of this Court in *Maness v. Meyers*, 419 U. S. 449, where an attorney was held in contempt for advising his client not to deliver certain papers pursuant to a subpoena. In considering the effect of a court's ruling, this Court said, 419 U. S. at 459:

> ". . . This does not mean, of course, that every ruling by a presiding judge must be accepted in silence. Counsel may object to a ruling. An objection alerts opposing counsel and the court to an issue so that the former may respond and the latter may be fully advised before ruling. United States v. La Franca, 282 U. S. 568, 570, 75 L. Ed. 551, 51 S. Ct. 278 (1931). But, once the court has ruled, counsel and others involved in the action must abide by the ruling and comply with the court's orders. *While claims of error may be preserved in whatever way the applicable rules provide*, counsel should neither engage the court in extended discussion once a ruling is made, nor advise a client not to comply . . ." (Emphasis supplied)

The Court held the attorney's right to be unqualified and fully effective in this connection, as it said, 419 U. S. at 466:

> ". . . *If performance of a lawyer's duty to advise a client that a privilege is available exposes a lawyer to the threat of contempt for giving honest advice it is hardly debatable that some advocates may lose their zeal for forthrightness and independence.*" (Emphasis supplied)

In the instant case, petitioner, in seeking to state the reason for his objection, was not disrespectful, loud or profane; he created no disorder in the courtroom, and he was acting in absolute good faith.

The good faith pursuit of a client's rights can never rise to the level of a criminal contempt. As this Court stated in *Maness v. Meyers, supra,* "wilfulness is an element of criminal contempt and must be proven beyond a reasonable doubt." For the purposes of criminal contempt ". . . wilfulness does not exist where there is a good faith pursuit of a plausible though mistaken alternative."

For this reason, also, it was error for the Court below to refuse to review the merits of the Trial Judge's order to determine whether there was good faith on petitioner's part.

The Court of Appeals below, in order to justify its decision, "assumed" that appellate courts would consider an objection where there was no offer of proof in the trial court if the reason for this was the Trial Judge's direction to counsel not to state the basis for his objection or not to make an offer of proof. This assumption is incorrect and unwarranted because the failure to adequately preserve objections for appeal results in the loss of rights on appeal, notwithstanding the Trial Judge's direction prohibiting the reasons for the objection or the offer of proof. This is

clearly illustrated not only in the decisions heretofore cited, but also in the very recent decision of *Morrissey et al. v. National Maritime Union, et al.*, 544 F. 2d 19 (2d Cir. 1976). There, a few days before the case was scheduled for trial, counsel for the primary defendant was advised that his client had to enter the hospital the same day that the trial was to begin for cancer surgery. Counsel immediately contacted the Trial Judge and requested an adjournment and offered to submit a medical affidavit. The Trial Judge replied that a medical affidavit was unnecessary as the adjournment would be denied in any event. The trial proceeded in the absence of the client, and the jury rendered a substantial verdict against the client. On appeal, the Second Circuit affirmed the denial of defendant's motion for a new trial on the ground that *counsel had failed to make an offer of proof as to what the client would have testified to had he been present at the trial.* Although counsel had been advised that the request for an adjournment would be denied regardless of what he might do, the Second Circuit held it was still necessary to make an offer of proof *to preserve the point for appeal.*

In the instant case, therefore, the right to preserve the point for appeal required the Trial Judge to afford petitioner the right to state his reason for the objection, in the one instance, and make the offer of proof in the second instance, where he was held in contempt.

In the *Matter of McConnell,* 370 U. S. 230 (1962), an attorney who had been stopped by the Trial Judge from pursuing a line of interrogation stated that he would continue to ask the questions until he was stopped by the bailiff. He made the statement because it was the only way he could properly preserve the Trial Judge's ruling for review on appeal. The attorney was held in criminal contempt. This Court stated, 370 U. S. at 232:

> ". . . This ruling placed Parmelee's counsel in quite a dilemma because defense counsel was still insisting that all offers of proof be made in strict compliance with Rule 43(c) and *there was no way of knowing with certainty whether the Court of Appeals would treat the trial court's order to dispense with questions before the jury as an excuse for failure to comply with the Rule.* Petitioner therefore not only sought to make clear to the court that he thought defense counsel's objection was 'right' but also repeatedly insisted that he be allowed to make his offers of proof in compliance with the Rule . . ." (Emphasis supplied)

The Court reversed the finding of contempt, holding that it was essential to justice "that lawyers be able to make honest, good faith efforts to present their clients' cases" (370 U. S. at 236).

The issue here involved may and does appear in literally thousands of cases which are daily tried in the courts. Where, on the one hand, counsel has to run the risk of criminal contempt if he persists in efforts to make a proper record on appeal, and on the other, faces the danger of forfeiting his client's rights on appeal if he does not, places counsel in a dilemma and cannot help but have a chilling effect on the ability of counsel to fulfill their responsibility to "fearlessly, vigorously and effectively" represent their clients.

This Court should grant certiorari and reverse the decision below.

CONCLUSION.

For all the foregoing reasons, it is respectfully submitted that a writ of certiorari should issue to review and reverse the decision below.

Respectfully submitted,

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